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SUPREME COURT, U.S.
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No. 517

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALBERT L. VITTER, JR., AND OLIVER J. COUNCE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (Pet. 29-30) is reported at 279 F. 2d 445.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1960 (Pet. 27-28), and a petition for rehearing was denied on August 5, 1960 (Pet. 28-29). The petition for a writ of certiorari was filed on November 3, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the amount paid by a prospective member of a country club for a share of the club's stock, pur-

chased because the club required that a member be a holder of a share, was an "initiation fee" within the meaning of the excise tax provisions of the Internal Revenue Code of 1954.[1]

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Internal Revenue Codes of 1939 and 1954 and of the Treasury Regulations are set forth in the Appendix, *infra*, pp. 7–9.

STATEMENT

The relevant facts, as set forth in the opinion of the Court of Appeals and not here challenged, are as follows:

The by-laws of the New Orleans Country Club ("the Club") required, *inter alia*, as a condition to membership, that a person be the holder of a share of stock in the Club. Stock in the Club was traded on the over-the-counter market and could be bought or sold by anyone, including a non-member. (Pet. 32, 34.)

While the stock may have had some value in its potential appreciation for sale to one desiring membership in the Club, it had no real worth apart from enjoyment of the Club's facilities by a member-holder of it. It was subject to "pro rata assessment at the direction of the Board of Governors for the purpose of paying the necessary initial and running expenses of the Club * * *"; "on failure of any stockholder to pay any assessment levied by the Board of Governors * * * on the share or shares held by him * * *"

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[1] The same question is also raised under the Internal Revenue Code of 1939. Since the pertinent provisions of the 1939 and 1954 Codes are substantially identical, we shall refer only to the 1954 Code.

the stock was subject to sale with the proceeds thereof to "be applied to the payment of all unpaid assessments due by said share of stock * * *"; this lien with right of sale expressly covered "other indebtedness due to the Club by the member in whose name [the stock] stands * * *"; and no share of stock could be transferred "until all past due and unpaid assessments, and other indebtedness, are paid in full." (Pet. 33.)

The only right a non-member shareholder had was to receive a pro rata share of the Club's assets upon its dissolution. The charter and by-laws specifically provided that "ownership of one or more shares of the capital stock of this corporation shall not confer upon the holder any of the rights or privileges of membership" and shall not "include the right to vote on any question or to use or go upon the property or assets of the organization, unless, in addition, the said holder shall have been duly elected a member of this organization in the manner" prescribed. (Pet. 33-34.)

Each petitioner purchased a share of stock in the Club on the open market in order to qualify for membership. Petitioner Connee purchased his share on November 24, 1953, for $1,425 plus brokerage fees. He also paid an initiation fee directly to the Club and was elected and admitted to regular membership on February 26, 1954. Petitioner Vitter purchased his share on February 4, 1957, for $5,000, plus brokerage fee. He also paid an initiation fee directly to the Club and was elected and admitted to regular membership on February 7, 1957. (Pet. 30-32.)

The Commissioner of Internal Revenue determined that the amount paid by each taxpayer for his share of stock constituted an "initiation fee" subject to the excise tax within the meaning of the applicable statutes. The Commissioner's determination was sustained by the District Court and the Court of Appeals. (Pet. 27–28.)

ARGUMENT

This case presents the narrow question whether the amount paid by a prospective member in purchasing a share of stock in a country club, in order to satisfy the club's requirement that members hold such a share, constituted an "initiation fee" which is subject to the 20 percent federal excise tax imposed on such fees by Section 4241 of the Internal Revenue Code of 1954 (*infra*, p. 8). Section 4242 of the 1954 Code (*infra*, p. 8) defines "initiation fee" as including "any payment * * * required as a condition precedent to membership * * * irrespective of the person or organization to whom paid * * *." Almost 30 years ago, two courts of appeals and the Court of Claims rejected the argument that because the amount paid for purchasing stock needed to qualify for membership in a country club was not paid to the club, it was not an "initiation fee" within the meaning of the substantially identical predecessor statute. *Mann* v. *Bowers*, 47 F. 2d 204 (C.A. 2), certiorari denied, 283 U.S. 845; *Knollwood Club* v. *United States*, 48 F. 2d 971 (Ct. Cl.); *Wild Wing Lodge* v. *Blacklidge*, 59 F. 2d 421 (C.A. 7). Similarly, a long-standing Treasury Regulation (*infra*, pp. 8–9) treats payments for purchasing qualifying shares in

a social club as an "initiation fee," regardless of the person to whom payment is made. As stated in *Munn*, *supra* (p. 205): "The tax imposed by this statute is an excise on the privilege of joining a club of a designated character."

The courts below correctly applied these principles in holding that the sums paid by petitioners in purchasing their stock constituted an "initiation fee." Concededly, petitioners made their purchase as a prerequisite to membership. (Pet. 32, 35.) The fact that the charter and by-laws of the Club required only that petitioners be the holders, rather than the owners, of stock affords no basis for escaping the tax. For petitioners did purchase the stock as "an incident to the main desideratum—membership in the club." *Wild Wing Lodge* v. *Blackledge*, *supra*, at 423. In the cases cited above, the imposition of the excise tax was sustained where the organizations in question required only that a prospective member own a share of stock, with no specific requirement that it be purchased. In the instant case, as the court below stated (Pet. 34–35), holding of the stock was "indispensable to membership," and petitioners "did not own" any shares. Since petitioners decided to satisfy the Club's stockholding requirement by buying a share, such purchase was, in a "real sense," "required as a condition precedent to membership." The statutory test is not, as petitioners urge (Pet. 14–18), whether the payment is "required by the Club," but whether it is "required as a condition precedent to membership." The other distinctions which petitioners make (Pet. 19) between

the facts of the instant case and those cited above are without significance.

Contrary to petitioners' contention (Pet. 20-22), the claim that the excise tax provisions in question may not have been administratively enforced in the past with respect to amounts paid for their shares by other members of the club is no bar to applying them to petitioners. Cf. *Automobile Club* v. *Commissioner*, 353 U.S. 180, 182-186. Nor do petitioners offer any statutory or other basis for their alternative suggestion (Pet. 22-24) that the tax should be measured only by the par value of, not by the actual amounts paid for, the shares purchased. Indeed, the Act is clearly to the contrary. It imposes a tax of "20 per cent of any amount *paid* as initiation fees" (Section 4241, *infra*, p. 8, emphasis added); the amount "paid" by petitioners is what the stock cost them, not its par value.

CONCLUSION

The decision below is correct. There are no conflicting decisions and there is no occasion for further review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 1710. TAX.

(a) [as amended by Sec. 543(a), Revenue Act of 1941, c. 412, 55 Stat. 687] *Rate.*—There shall be levied, assessed, collected, and paid—

* * * * * *

(2) *Initiation Fees.*—A tax equivalent to 20* per centum of any amount paid as initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $10 per year.

* * * * * *

(b) *By Whom Paid.*—The taxes imposed by subdivision (a) shall be paid by the person paying such dues or fees. * * *

(26 U.S.C. 1952 ed., Sec. 1710.)

SEC. 1712. DEFINITIONS.

As used in this subchapter—

* * * * * *

(b) *Initiation Fees.*—The term "initiation fees" includes any payment, contribution, or loan, required as a condition precedent to membership, whether or not any such payment, contribution or loan is evidenced by a certificate of of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned.

(26 U.S.C. 1952 ed., Sec. 1712.)

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* This rate was changed from 10 per centum by Section 502, Revenue Act of 1943, c. 63, 58 Stat. 21.

Internal Revenue Code of 1954:

SEC. 4241. IMPOSITION OF TAX.

(a) *Rate.*—There is hereby imposed—

* * * * *

(2) *Initiation Fees.*—A tax equivalent to 20 percent of any amount paid as initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $10 per year.

(b) *By Whom Paid.*—The taxes imposed by this section shall be paid by the person paying such dues or fees. * * *

(26 U.S.C. 4241.)

SEC. 4242. DEFINITIONS.

* * * * *

(b) *Initiation Fees.*—As used in this part the term "initiation fees" includes any payment, contribution, or loan, required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned.

(26 U.S.C. 4242.)

Treasury Regulations 43 (1941 ed.):

SEC. 101.28 *Initiation Fees.*—* * *

Under the Code the term "initiation fees" includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned. It is not material whether the applicant has any hope or expectation of a return of his payment upon resignation, death, or other circumstances, nor is it material to whom he pays the money. For ex-

stance, if a golf club requires incoming members as a condition precedent to membership to purchase either from it or from retiring members a share of stock, the tax attaches to any such payment for the stock regardless of the fact that it represents a property interest in the assets of the club. Likewise, if the purchase of a share of stock in a landholding corporation is a necessary precedent to membership in the club, the amount paid for such share of stock is taxable. In the case of a transfer of stock from a retiring member the club should collect the tax on the amount paid by the new member for the stock as well as tax on any transfer fee required from the new member.

If the initiation fee exceeds $10, the tax attaches regardless of the amount of dues or membership fees paid by an active resident annual member. If the initiation fee does not exceed $10, the tax does not apply unless the dues or membership fees, exclusive of initiation fees, of an active resident annual member are more than $10 per year. If such dues or membership fees are in excess of $10 per year, any amount paid as an initiation fee is taxable whether the payment exceeds $10 or not.

* * * * *

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